

Casebook

Obscenity

○ Rankin =

~~Metro News~~ Wagner =

✓ Coles -

✓ MacMillan

✓ Town Cinema -

18 CCC (3d) 193
at 205

✓ Times Square <

✓ Ramsingh

Red Hot

Un of Manitoba =

Robert
Winkler =

Germain

5 and it looked like we were going to have to go through the whole thing with that sales person so we didn't bother.

160 Q. After Byrne left MAI did you call up whoever took over at MAI?

A. Never heard anymore from them.

161 Q. Did you contact ---

10 A. Well, we heard from them but it was a year and a half later some guy phoned up from there. He just happened to come across the file he said but we already signed with Honeywell before we ever heard from someone there.

162 Q. I gather that you ultimately didn't do very much further with Quantel as well.

A. No. Once this guy we had went with them then we figured we would stay clear.

163 Q. Did you consider getting another consultant in ---

A. No.

164 Q. --- when you found out that Zanbranski wasn't quite as independent as ---

A. No.

165 Q. At the time that you were doing this who was involved in talking to these salesmen and sort of coordinating what was going on?

25 A. I was in it all the time and at sometimes Fred Parking and sometimes Wayne Vincent.

166 Q. Were you doing memoranda to one another letting the others know what had been discussed?

A. No.

30 167 Q. Did you have joint meetings with any of these vendors to just make sure that everyone was all on

R v Times Square (1971 / OCA / Gale, McGillivray, Jessup)

HIST: appeal from conviction on chg of exposing obscene videotape - all'd: new trial ordered.

COURT: undue exploitation of sex was to be determined on all the evidence having regard to all 3 factors:

- purpose of the producer
- artistic merit of the work
- community stds of tolerance.

(see p. 237)

↓

{ compare to Dickson, in Twelve Square, p. 504
who says there are 2
independent tests: - community stds.
- artistic purpose. }

R v Towne Cinema (1985 / SCC /

HIST: trial - convicted of presenting obscene entertainment (ie film).
ATCA - appeal dismissed.
SCC - new trial ordered.

(Dickson):

- RATIO: ① Community stds is only one test of "undueness" (it does not address "artistic merit" because it was not argued: p. 504)
- ② ~~What is the standard for the community?~~ community stds = what Canadians would not abide other Canadians seeing
- ③ audience to which film targeted is relevant because community may tolerate different things for different audiences.
- ④ trial Judge not permitted to apply his own subjective stds of taste

(Beetz & Estey McIntyre): audience is not relevant.

(Wilson): onus on crown to adduce evidence of "undueness"

Re Rankine [Ont Co Ct / Borins Co Ct J / 1983]

HIST: trial for distrib. obscene publications (ie films).

RATIO: Community stds. would tolerate scenes consisting
of people engaged in

- sexual intercourse
- group sex
- lesbianism
- fellatio
- cunnilingus
- anal sex.

But not violence or degradation in conjunction w/ sex

R v Wagner [1985 / Alta QB / Shannon J].

HIST: - trial for selling & distrib. obscene matter (videotapes)
- conviction affirmed by Alta CA / 1986 / per Irving JA

AAT10: → community stds will tolerate erotica, no matter how explicit, which portrays positive and affectionate human sexual interaction between consenting adults participating on the basis of equality

→ will not tolerate a) sex w/ violence or cruelty
b) dehumanizing or degrading sex.
even if no violence ~~or cruelty~~

Av Colee Book Stores (1974 / Alta S.C / Legg DCJ).

HIST: application to show cause why "Jos" is not obscene.

RATIO: ① no ~~use~~ exploitation of sex by authors
even though dominant characteristic of
book is sex, because the author's purpose is serious.

② onus on crown to show the publication is
obscene DESPITE the wording in s. 160(2)
[ie "the accused must show cause..."].

Re Priape (1979/ Que Sup Ct / Hugessen ACJQ)

HST: appeal from Dep. Min under s. 47 Customs Act classifying as immoral or indecent - all'd in part.

Court: ① test = whether material would shock or disgust the average member of the contemporary Canadian community.

② community less tolerant of overt homosexual acts than of similar acts between heterosexuals (although male frontal nudity is not within the prohibited category).

R v Robert (1981 / OCA / Zuber JA)

HIST:

(R v Pink Triangle) (Body Politic)
trial → acquitted on chg of mailing immoral or indecent matter
County Ct → new trial ordered.
OCA → affirm order for new trial.
SCC → motion for leave refused Oct 6/1981.

RTIO: ① the whole publication need not be found to be immoral or indecent

② magazine or newspaper must be judged in a different way than a novel. (which must be considered as a whole)

③ test to be applied is the community std of immorality or indecency

Re University of Manitoba (1983 / Manitoba Cct / Ferg Cct J)

HIST: appeal from dec'n of Dep Min. under s. 47
which banned film on male masturbation
- all'd.

RATIO: ① must look at the purpose of producing film
& purpose for which film used.
(viz. for medical students)

- ② . where
- legitimately created,
 - for moral & educational purpose.
 - used in impeccable surroundings
 - impeccable motives,

then NOT immoral or indecent.

Re Winkler (1973) / Out (Ct) / Phelan (Ct)

HIST: appeal from Dep. Min prohibiting books — dismissed
Oral Sex & the Law Decision in Denmark.

RATIO: ① must ask: are the photographs necessary to a full understanding of the book?

② even if book is serious, a disproportionate stress on illustrations which are completely impregnated with sex outweighs the scholarly or artistic merit
i.e. immoral or indecent.

③ just because books imported for personal use, as opposed to distribution, does not render them any less obscene.

R. v. Ramsingh et al. 14 C.C.C. (3d) 230

Manitoba Court of Queen's Bench July 18, 1984

Feng, J. (trial)

Facts

The accused was charged with possession of obscene films for the purpose of distribution, contrary to Sec. 159 of the Criminal Code.

Ratio

① To determine obscenity under 159(2), one must apply a national community standard of tolerance.

② The national community will not tolerate films that degrade or dehumanize women, unless the violence in the film is of an innocuous and insignificant simulated kind.

③ Sec. 159 is not unconstitutional by reason of Sec. 2(b) of the Charter. The section provides a reasonable limitation which can be justified under Sec. 1 of the Charter.

④ Accused was convicted.

R. v. Delorme 15 CCC (2d) 350

Quebec Court of Appeal March 22nd, 1973

Montgomery, Tuzeev and Gagnon, J.J.A.

(Montgomery dissented from majority)

Appeal from conviction by A.C. 1, J.S.P.

Court of Queen's Bench (Criminal) - June 8, 1970

Facts

Accused was charged with possession of an obscene book for purpose of distribution contrary to s. 159 (1) (a) of the Criminal Code. Accused printed a book done. The book was The Story of O.

Ratio

① Accused claimed book was for "public good" as it was an experimental novel dealing with sex and human loneliness.

② Majority held that accused had failed to discharge his burden of showing that the book was for the public good.

③ The book would only be appreciated for its "higher qualities" by the sophisticated reader, not the average reader.

④ Accused had not restricted access only to those capable of deriving some advantage from it.

Dissent by Montgomery, J.A.

① Public good was served by the dissemination of the book.

② Book would not appeal to those interested only in erotica.

R. v. The Mac Millan Company of Canada Ltd.
72 D.L.R. (3d) 33

County Court Judge's Criminal Court, Judicial
District of York, Ontario July 16, 1976

GRABURN, Co. Ct. J. (trial)

Facts

The accused corporation was charged with possession of obscene books for the purpose of distribution contrary to sec. 159(1)(a) of the Criminal Code. The book was Show Me, a sex manual for children and their parents.

Ratio

① To determine if the book has as a dominant characteristic the undue exploitation of sex, the Court must have regard to the book as a whole, not to isolated photographs or passages.

② The author's purpose will also be considered.

③ Criteria for undue exploitation:

A) inherent necessities of the book; And

see p. 43
p. 60
B) the standards of the contemporary Canadian community - the average person would have no objection to the book being seen and read by those who

wish to read it.

④ Criminal acts are not ipso facto proof of obscenity.

⑤ The book serves the public good.

⑥ Book not obscene.

R. v. Video World

Manitoba Court of Appeal, September 1985

Facts: Video outlet alleged to be circulating smutty videos, contrary to s. 159 of the Criminal Code.

Findings and issues:

Huband J.A. (majority--4 other judges concur): simply states that community standard of tolerance exceeded because of sexual scenes of films. There is undue exploitation. Simply relies on Cinema International case (M.C.A. 1982)

Matas J.A. (no others concurring) :

History: Accused acquitted at trial. Appeal allowed and conviction entered by Man. C.A.. Leave to appeal granted by the Red Nine, to be heard in the present term.

January 12, 1987

Client No. 41
Matter No. CG000001

Mr. Sidney Jaffe
110 Bloor Street West
Suite 1905
Toronto, Ontario
M5S 2W7

- IN ACCOUNT WITH -

Charles Campbell
ILER, CAMPBELL & ASSOCIATES
Barristers & Solicitors
136 Simcoe Street
Suite 201
Toronto, Ontario
M5H 3G4

RE: Jaffe ats. Grant

DATE

PARTICULARS

Dec. 9/86

Copying case: (M. J. G. 100)

R. v. Red Hot Video

B.C.C.A.; March 1985

Facts: Accused charged with possession for the purposes of distribution, a number of smutty films. Agreed that films were obscene within the meaning of s. 159 of the Criminal Code. Issue was whether obscenity provisions of Code were in violation of sections 2(b) and 7 of Charter.

Issues/Findings:

Definition of obscenity not so broad as to offend principles of fundamental justice under the Charter.

The courts have no difficulty in applying the community standards test (!).

Violent sexual videos are obscene; so are ones which degrade the participants by portray them as having animal characteristics.

Anderson J: (concurring) Material lacking in serious artistic, literary, scientific, or political value and dealing to an excessive degree with explicit sex and violence, children, or the portrayal of men and women as having animal characteristics. Material with these images can be salvaged if have artistic, literary, scientific, political merit.

To be demonstrably justified under section 1, it must be shown that harm would result if the freedom were not curtailed.

History: Accused convicted at trial. Appeal to B.C.C.A. denied.

4. My reply does not extend to any period of time later than the date of the fiscal period under review and noted above.

5. My reply is solely for your information and assistance in connection with the audit of the financial condition of 440423 ONTARIO LIMITED and is not to be quoted in whole or in part or otherwise referred to in any financial statement or related document, nor is it to be filed with any governmental agency or other person without my prior written consent.

6. It is impracticable for us to give details of each and every matter upon which we have received inquiries from this company over the telephone from day to day or by correspondence. As we act in a general capacity for 440423 ONTARIO LIMITED, we assume that outstanding matters in the ordinary course of this company's business are not of immediate concern, but that this inquiry relates only to legal actions commenced or threatened against it. It is possible that outstanding matters upon which we have advised this company from day to day may ultimately lead to litigation.

Subject to the foregoing, as of January 9, 1987, I reply as follows:

There are no claims or possible claims with respect to which my firm's advice or representation has been sought and which are outstanding.

Yours truly,

Charles Campbell

CC:da

cc: SAMSON BELAIR *M*

Chartered Accountants

390 Bay St

Germain v. R.

S.C.C.; October 1985.

The Nationale Sexe Boutique case.

Issues/Findings:

Sex toys are 'publications' under the Criminal Code.

Context in which articles are displayed is relevant to the finding of obscenity. Here, court below erred in not taking into account that inside store on the door of which was sign "For Adults Only". But note that clientele at which store directed is not relevant.

History: Convicted at trial. Appeals to Quebec Cour Superieur, Court of Appeal, and the red nine all dismissed.

Resolution of the Board of Directors
and Shareholder of Chandomal Limited

RESOLVED that the Sampson Belair are re-appointed as auditors for Chandomal Limited for the fiscal year ending June 30, 1985.

RESOLVED that the financial statement for the fiscal year ending June 30, 1984 is approved.

The foregoing resolution is hereby passed by the sole director and shareholder of the corporation pursuant to the Business Corporations Act evidenced by her signature hereto.

June 29, 1985.

FLORENCE E. CAMPBELL